

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the petition by Unified) Docket No. 2012-1-SW
Disposal Board for a declaratory ruling)
on the applicability of § 75-10-115, MCA,) DECLARATORY RULING
and associated administrative rules to)
fees for its landfill)

The Montana Department of Environmental Quality (Department) hereby issues its ruling on the Petition for a Declaratory Ruling filed by the Unified Disposal Board on October 5, 2011. The ruling and the reasons for it follow.

DECLARATORY RULING PROCEEDING

On October 5, 2011, the Unified Disposal Board (UDB) filed a Petition with the Department for a Declaratory Ruling under § 2-4-501, MCA, and rules adopted pursuant to that statute at ARM 17.4.101(1), which adopts, among other rules, the Montana Attorney General's Organizational and Procedural Model Rules concerning declaratory rulings at ARM 1.3.226 through 229.

Questions Presented

In the Petition, UDB presented certain questions and requested the Department to rule on them. The Department has rephrased the questions presented to reflect the legal, regulatory, and factual situation concerning the Unified Disposal District (UDD) landfill, as follows:

I. Does the Department have discretion to issue a preliminary, initial, or conditional license to a person operating a solid waste landfill so that no annual renewal fee will be due until the landfill starts receiving waste?

II. Is a landfill licensee excused from paying the annual fee provided for in ARM 17.50.410, Table 1, during the period starting when the Department issues a license and ending when the landfill first receives waste because the fee constitutes a prohibited confiscatory tax, or because the fee violates the intent of the Legislature in § 75-10-115(1)(b), MCA, that the fee "reflect[] a minimal base fee related to the fixed costs of an annual inspection and license renewal"?

Factual and Regulatory Background

UDB¹ is a multi-county and city solid waste district organized in 1983 under

¹ The Petition refers to Petitioner as Unified Disposal Board (UDB). UDB was created by Interlocal Agreement in 1983. Under that Agreement, all property owned by UDB must be owned in the name of UDB. According to the Cadastral Database administered by the Montana Department of Administration, the landfill property is owned by the "Unified Disposal District" (UDD). The application to the Department for the landfill license addressed in the Petition was filed by UDD, and the

1. The first part of the document is a list of the names of the persons who were present at the meeting. The names are listed in alphabetical order.

the following sections of the Montana Code Annotated: §§ 7-13-201 (authorizing solid waste districts, since repealed), 7-11-104 (authorizing interlocal agreements), and 75-10-112 (authorizing local governments to operate solid waste management systems and enter into interlocal agreements to do so). UDB operates an existing landfill in Hill County, Montana (the Old Landfill). UDB, using the name Unified Disposal District (UDD), has recently applied to the Department for, and received, a license, No. 490, for a new landfill in Hill County (the New Landfill).

Because the license application for the New Landfill stated that it was projected to receive 25,000 tons/year of Group II solid waste, it is a major Class II landfill and its application fee was \$12,000 under ARM 17.50.410, Table 3.

Once the Department receives an application for a landfill license, it reviews the application to determine if it is complete. ARM 17.50.513(1). If complete, the Department analyzes it to determine if it satisfies the requirements of the landfill laws and rules and whether an environmental impact statement is required. ARM 17.50.513(3). The Department notifies the appropriate local health officer of the receipt of the application, as required in § 75-10-222(1), MCA, and conducts an environmental review under the Montana Environmental Policy Act, Title 75, chapter 1, part 2, MCA.

Within 30 days after it completes the environmental review, the Department is required to make a final decision to deny or issue the license and then notify the applicant, appropriate local health officer, and other interested persons. ARM 17.50.513(7) and § 75-10-222(2), MCA. The license is not valid unless the county health officer signs it. § 75-10-222(3), MCA.

Once the Department has issued a license to a landfill, the Department is required by ARM 17.50.410(1)(c) to assess an annual license renewal fee according to ARM 17.50.410, Table 1 (\$4,200 for a major Class II landfill such as the UDD's), and mail an invoice by June 15 of each year. The licensee is required to pay that fee to the Department by July 31 of each year, but may submit it quarterly, with the first payment due on July 31 and subsequent payments due on October 31, January 31, and April 30. ARM 17.50.410(1)(c).

Failure to pay the fee when due subjects a licensee to a criminal penalty of \$2,000, imprisonment not to exceed six months, or both, and to payment of principal and interest. § 75-10-116, MCA.

When the current fees in Table 1 were proposed in 2003, the fees had not been changed since they were established in 1991. The 2003 proposed rulemaking notice by the Montana Board of Environmental Review (BER) predicted that the proposed fee increases would raise an additional \$165,046 for the Department to use to fund its solid waste activities, including "issuing of licenses, monitoring, inspections, and compliance assistance and enforcement at licensed and unlicensed solid waste management systems." That notice further stated that the "fees fund 11 full time employees (FTEs) in the solid Waste Licensing and Regulatory programs, the Pollution Prevention Program and the Department's Legal Unit," and that they were "based on the type of waste collected, the waste handling process and

Department issued the license to UDD. The Department has been unable to find any evidence of the existence of an entity named UDD. In this Ruling, the Department uses the name appearing in the particular document being discussed.

volume/tonnage of waste treated, stored, or disposed of, as required by 75-10-115, MCA." Notice of Public Hearing on Proposed Amendment to Rules Pertaining to Solid Waste Fees, 2003 Mont.Admin.Reg. 1720, 1729 (August 14, 2003), adopted as proposed as to ARM 17.50.410, Table 1 at 2003 Mont.Admin.Reg. 2857 (December 24, 2003).

For the year in which a license is originally issued, the annual landfill license fee is prorated by calendar quarter. ARM 17.50.410(1)(d). In addition to the annual fee, each landfill is required to pay the Department a fee of \$0.40/ton disposed of in the previous year. ARM 17.50.410(1)(c) and Table 1. This is referred to as the tonnage fee. Because § 75-10-221(4), MCA, states that a landfill license lasts "for a period not to exceed 12 months unless renewed by the department," an annual renewal application and approval is required to keep a license in effect.

A landfill license expires on June 30 of a year if not renewed. ARM 17.50.410(1). The Department is required to mail renewal application forms to licensees by February 1 of each year. A licensee must submit a renewal application to the Department by April 1 of each year. ARM 17.50.410(2).

UDD applied to the Department for a license for the New Landfill on July 16, 2008. The Department issued the license for the New Landfill to UDD on October 27, 2009.

The license was issued with 10 conditions, which were attached to the Petition as Attachment B. The Legislature has implicitly provided for the issuance of a solid waste license with conditions in § 75-10-227(1), MCA, which authorizes the Department to issue an administrative order requiring corrective action or assessing penalties for a violation of a solid waste "permit provision," and § 75-10-228(1), MCA, which authorizes the Department to file a lawsuit seeking penalties for a violation of "a license provision."

Three conditions (Nos. 1, 5, and 9) attached to the license and contained in Attachment B required UDD to comply with engineering and storm water requirements when constructing the landfill.

The remaining seven conditions in Attachment B regulate the operation of the landfill concerning litter control (Nos. 2 & 3), acceptance of petroleum-contaminated soils (No. 4), documentation of removal of ozone-depleting refrigerants (No. 6), storm water and leachate releases (Nos. 7-8), and open burning (No. 10). There are other requirements that a landfill must meet before and after the initial receipt of waste. They are contained in the statutes, rules, operations and maintenance (O&M) plan, and other submittals by the licensee that are subject to approval by the Department. See, e.g., ARM 17.50.509, which sets forth the requirements for a landfill's O&M plan; ARM 17.50.540, which requires a Class II landfill to have cost estimates and funded financial assurance for closure and post-closure care before the initial receipt of waste; ARM 17, chapter 50, subchapter 11, which contains operating criteria; and ARM 17.50.1403 and 1404, which require closure and post-closure care plans to be submitted and approved before a landfill may receive waste.

The solid waste regulatory structure provides for a license application and approval, and then for the satisfaction of engineering requirements and operating conditions before waste may be accepted. License conditions must continue to be met while the landfill is operating. In summary, the process established by § 75-10-

221, MCA, and ARM 17.50.410 is that an applicant applies for a license and pays an application fee, and the Department reviews the license application. If it is adequate, the Department issues the license with conditions that must be met either before waste may be received or as ongoing operational requirements. Once a license is issued, an annual renewal application and fee must be submitted.

According to the Petition, UDB expected the New Landfill to be ready to start receiving waste in October 2011. The Department's records indicate that it did begin to receive waste during the last week of October 2011. However, UDD had not satisfied all operating requirements by that date; for example, UDD failed to make the first payment of money into its closure and post-closure financial assurance trust fund before the initial receipt of waste, as required by ARM 17.50.540(5)(a)(v). The Department mailed UDD a violation letter on December 15, 2011, for failing to comply with that requirement. UDD has not yet paid the required funds into the trust fund.

Based on the above authorities, once UDD had a license from the Department, it was required to pay an annual license renewal fee of \$4,200 to the Department each year. Because the New Landfill did not receive waste from October 2009 through most of October 2011, no tonnage fee was due for that period.

The amount of the prorated fee invoiced for FY 2010 (October 27, 2009 – June 30, 2010) was \$2,800. The amounts invoiced for FY 2011 (July 1, 2010 – June 30, 2011) and FY 2012 (July 1, 2011 – June 30, 2012) were \$4,200 each. The Department mailed invoices for the annual fee to UDD in February of 2010 and February 2011, and mailed past-due notices on May 9 and September 6, 2011.

UDD submitted timely annual license renewal applications to the Department in 2010 and 2011, but did not pay the annual license renewal fees when due. After obtaining assurances from the Department that the fees would be refunded if this Petition was decided in its favor, Hill County paid the Department \$7,000 in past-due fees for Fiscal Years 2010 and 2011 on September 26, 2011.

For Fiscal Year 2012 so far, UDD is responsible for a total of \$2,100 in fees: \$1,050 fees for the 1st quarter (July 1 – September 30, 2011), which were due on July 31, 2011; and \$1,050 for the 2nd quarter (October 1- December 31, 2011), which were due on October 31, 2011. UDD paid \$1,050 on October 31, 2011. Therefore, if this Ruling declares that a fee is required, UDD is currently \$1,050 in arrears.

After the Department issued the license for the New Landfill on October 27, 2009, the Department expended about 61 hours of staff time for a total cost of about \$3,700 from November 2009 through October 2011. Work performed by Department staff included, among other things, reviewing portions of the construction manual, working with a UDB representative concerning financial assurance required before the New Landfill could accept waste, addressing license renewal and required fees, and addressing a storm water discharge violation. See Exhibit 1. The Department also expended some additional staff time in December 2011, including the performance of a site inspection on December 5, 2011.

Analysis

I. Does the Department have discretion to issue a preliminary, initial, or conditional license to a person operating a solid waste landfill so that no annual renewal fee will be due until the landfill starts receiving waste?

As described above, the solid waste laws and rules provide for an application for a license, and for issuance of a license if requirements are satisfied. An annual fee is required for each year after a license is issued. Once a license is issued, construction may proceed when rules and conditions of applicable plans are satisfied. Waste may be received if regulatory requirements are satisfied. There is no provision in the solid waste laws or rules for a preliminary, initial, or conditional license.

UDD states that the "license was conditioned on construction of the engineered plans including 10 listed items noted on Attachment B." It is true that the Department did include conditions when it issued the license. However, these conditions did not make the license preliminary, initial, or conditional. Rather, a full license was issued, with requirements that had to be met when the landfill was constructed and before it first received waste and continuously afterwards.

The conditions in Attachment B were those requirements that the Department believed were especially relevant to the New Landfill and that it wished to emphasize to the licensee: that construction had to comply with submitted and approved plans, and that the landfill, once receiving waste, had to be operated properly concerning litter control (in a very windy area), contaminated soils, ozone-depleting compounds, water protection, and air quality.

The issuance of the license was not delayed pending satisfaction of the conditions listed in Attachment B. Once UDD satisfies the regulatory requirements and license conditions, and obtains any necessary approvals, it is entitled to receive waste at the New Landfill.

In summary, the license conditions in Attachment B did not make the issuance of the license for the New Landfill dependent on satisfaction of the conditions. Rather, the conditions were requirements of construction or operation, and failure to comply with them could subject the UDD to enforcement.

Therefore, the ruling on the first question is that the Department does not have discretion to issue a preliminary, initial, or conditional license to a person operating a solid waste landfill, and that an annual license renewal application fee will be due during each year after the license was issued, regardless of whether the landfill is receiving waste.

II. Is a landfill licensee excused from paying the annual fee provided for in ARM 17.50.410, Table 1, during the period starting when the Department issues a license and ending when the landfill first receives waste because the fee constitutes a prohibited confiscatory tax, or because the fee violates the intent of the Legislature in § 75-10-115(1)(b), MCA, that the fee "reflect[] a minimal base fee related to the fixed costs of an annual inspection and license renewal"?

UDB argues, in the Petition at p. 5, that because the landfill was not open and

receiving waste from the date it was licensed, October 27, 2009, until October 2011, and the Department was therefore not inspecting or incurring any expense for a renewal, the fee is not related to services, and is therefore a confiscatory tax. UDD further argues that the fee violates legislative intent, because the fact that the Department did not conduct an inspection means that the fee was not related, as § 75-10-115(1)(b), MCA, requires, to the "costs of an annual inspection and license renewal."

These arguments are not persuasive, for two reasons. First, the Department did incur significant costs for regulation of the New Landfill during that period. Second, the fee was set based on a reasonable estimate of the costs of regulation. Because the annual fee is reasonably related to the estimated costs of the Department's regulation of the landfill, it is a fee and not an unreasonable tax. The fee is related to the estimated costs of an annual inspection and license renewal, and so does not violate the intent of § 75-10-115(1)(b), MCA.

The Montana Supreme Court has established a three-part test for determining if a particular assessment is a tax. In *Montana –Dakota Utilities Co. v. City of Billings*, 2003 MT 332, ¶ 25, 318 Mont. 862, 80 P.3d 1247 (MDU), the Court stated that it has held that "a governmental demand for money made for the purposes of raising revenue is a tax. ... If the charges are primarily tools of regulation, they are not taxes." *Id.* The Court referred to the following three-part test from a Washington case, *City of Lakewood v. Pierce County* (2001), 106 Wn. App. 63, 23 P.3d 1, to determine if a purported fee constituted a tax:

1. Whether the primary purpose is to raise revenue or regulate;
2. Whether the money collected is allocated only to the authorized regulatory purpose; and
3. Whether there is a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer.

MDU, ¶ 23. See also MDU, ¶ 25, citing *Lechner v. City of Billings* (1990), 244 Mont. 195, 797 P. 2d 191; *Montana Innkeepers Assoc. v. City of Billings* (1983) 206 Mont. 425, 671 P.2d 21; and *Brueggemann v. City of Billings* (1986), 221 Mont. 375, 719 P.2d 768; and 16 E. McQuillin, *Municipal Corporations*, § 44.02 at 2 (3rd ed. Supp. 2003).

When applying the first part of the MDU test, whether the primary purpose is to raise revenue or regulate, the language of §§ 75-10-115(1) and 75-10-106, MCA, is instructive. Those sections authorize the solid waste fees that are at issue in this matter. Section 75-10-115(1), MCA, provides that "(1) The department may prepare rules for adoption by the [Montana Board of Environmental Review, or BER] ... that set fees for the management and regulation of solid waste at facilities subject to regulation pursuant to [Title 75, chapter 10, part 2, MCA]. Upon adoption by the [BER], the department may collect the fees. These fees may include: ... (b) a flat annual license renewal fee that reflects a minimal base fee related to the fixed costs of an annual inspection and license renewal"

Then § 75-10-106, MCA, requires the BER to "adopt rules necessary for the implementation of this part, including but not limited to rules governing ... (2) the

application fee, flat annual license renewal fee, and tonnage or volume-based renewal fee for solid waste management systems prepared by the department pursuant to 75-10-104 and 75-10-115."

Therefore, the statutory language at issue affirmatively states that the fees assessed are to be assessed "for the management and regulation" of regulated solid waste management facilities. The fees are not assessed for raising revenue generally. So, application of the solid waste law to the first prong of the *MDU* test lends support to a conclusion that the flat annual renewal fee is regulatory, and therefore a fee, and not a tax.

The second prong of the *MDU* test, whether the money collected is allocated only to the authorized regulatory purpose, is also addressed in statute. Section 75-10-115(2), MCA, provides: "All fees collected must be deposited in the solid waste management account provided for in 75-10-117." Section 75-10-117(1), MCA, provides for a solid waste management account that, under § 75-10-117(3) MCA, "may be used only for...administration of 75-2-215, part 2 of this chapter, and this part. § 75-2-215, MCA, concerns air quality aspects of waste incineration. Title 75, chapter 10, parts 1 and 2 concern solid waste regulation. When § 75-10-117(1), MCA, is read together with § 75-10-117(3), MCA, it is clear that the solid waste fees received from UDD for the New Landfill are to be deposited in a solid waste management account and can be used only for administration and regulation of solid waste. Therefore, the flat annual renewal fee at issue here is allocated only to administration of the regulatory purpose of the license. So, the second prong of the *MDU* test also militates toward the conclusion that the flat annual renewal fee is a regulatory fee and not a tax.

The third prong of the *MDU* test involves the relationship between the fee charged and the services received. Under ordinary circumstances, a license is obtained and construction of the facility commences soon afterward. In this case, after the Department issued the license for the New Landfill on October 27, 2009, the Department expended about 61 hours of staff time for a total cost of about \$3,700 from November 2009 through October 2011. The work performed by Department staff was related to the regulation of the New Landfill before it was authorized to receive waste.

The Department also performed a site inspection on December 5, 2011.

The expenditure of about 61 hours of staff time, with a total cost of \$3,700, demonstrates that the Department has used some funds from the account into which the UDB annual renewal fees were deposited to conduct solid waste regulatory activities for the New Landfill. The fact that the facility had not, by October 2011, satisfied all of the operating criteria necessary for it to begin to receive waste did not eliminate the Department's duties or costs to regulate the facility. If the facility had been accepting waste during that period, an additional fee of \$0.40 per ton of waste disposed of would have been assessed, and the Department may have had to provide additional services. Therefore, services were provided to Petitioner by the Department to regulate the New Landfill.

The Department recognizes that the amount of fees invoiced, \$9,200, is greater than the costs incurred by the Department, \$3,700. This does not make the fees a prohibited tax. The assessment, collection, and expenditure of solid waste license fees are not exact endeavors. As noted above, the BER established solid

waste fees based on estimates of the Department's costs for analyzing all license applications, regulating all solid waste regulatory programs, funding pollution prevention programs, and solid waste legal work. Some of the fee money collected is used to fund the Department's work in providing technical assistance for planning, integrated waste management, and waste reduction. See § 75-10-104(3), MCA. Some of the fees are used to fund enforcement and legal work. The Department does not conduct cost-accounting on a project-specific basis for each license application and renewal. Project-specific accounting is not required by statutes or by case law. It is unnecessary for the Department to match closely the fees and the costs associated with a particular license. Rather, because the "costs must be prescribed in advance, they must of necessity be based upon estimates which it is the right and duty of the ... authorities [here, the BER] to make." *State v. Pepper* (1924), 70 Mont. 596, 605, 226 P. 1108, 1110.

The annual license renewal fees in ARM 17.50.410, Table 1, were based on a reasonable estimate of costs of regulation, and are appropriate. On balance, the annual license fee adopted by the BER and assessed by the Department satisfies the requirement of § 75-10-115(1)(b), MCA. Therefore, application of the facts and law here to the third prong of the *MDU* test, the relationship between the fee charged and the services received, shows that the annual renewal fee is a fee and not a tax.

Thus, application of the facts here to the three prongs of the *MDU* test lead the Department to conclude that the annual solid waste license fee is a permissible fee and not a prohibited confiscatory tax. Because the fee was adopted as part of a reasonable estimate of the Department's costs of regulating solid waste facilities, it is related to the cost of an annual inspection and license renewal, and so does not violate legislative intent.

Therefore, the ruling on the second question is that the annual solid waste license fees assessed on UDD during the period from October 2009 through October 2011 were permissible and did not violate legislative intent.

Given this regulatory structure, a landfill owner may avoid paying additional annual fees for a solid waste license only by applying for a license so that it obtains it close to the date the landfill is needed.

The Department is constrained by current statutes and rules to assess an annual fee for each year that a landfill has a license. Changes to the statutes and rules would be necessary to allow a landfill not to pay an annual fee for each year it is licensed.

RULING

NOW, THEREFORE, for the foregoing reasons, the Department, pursuant to § 2-4-501, MCA, rules and declares that:

1. The Department does not have discretion to issue a preliminary, initial, or conditional license to a person operating a solid waste landfill, and an annual license renewal application fee will be due during each year after the license was issued, regardless of whether the landfill is receiving waste; and
2. The annual solid waste license fees assessed on UDD during the period from October 2009 through October 2011 were permissible and did not constitute

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confiscatory taxes. Further, they did not violate the legislative intent of § 75-10-115(1)(b), MCA.

Dated this ^{2nd} ~~1st~~ day of February, 2012

STATE OF MONTANA
DEPARTMENT OF ENVIRONMENTAL QUALITY

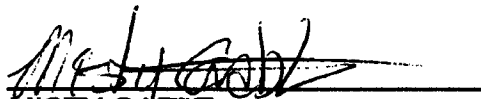

RICHARD H. OPPEN, Director

NOTICE: Petitioner has the right to appeal the decision of this agency by filing a petition for judicial review in district court within 30 days after service of this decision. Judicial review is conducted pursuant to 2-4-702, MCA.

CERTIFICATE OF SERVICE

I hereby certify that on February ^{2nd} ~~1st~~, 2012, I mailed a true and correct copy of the foregoing Ruling, postage prepaid, by U.S. Mail, to the following:

Gina Dahl, Hill County Attorney
Hill County Courthouse
Havre MT 59501


MISTY GABLE

Department of Environmental Quality
 Permitting & Compliance Division
 Waste & Underground Tank Management Bureau
 Solid Waste Management Program

***Services Provided to the New UDD Class II Facility
 between 10/27/2009 through 10/31/2011***

Summary Total Expenses	2009	2010	2011	Totals
Personal Services (Salary + Benefits)	182.07	879.56	1,080.33	2,141.96
Travel/Indirects	38.24	435.66	467.71	941.61
	220.31	1,315.21	1,548.04	\$ 3,083.56
Overhead 20%	44.06	263.04	309.61	616.71
Totals	264.37	1,578.26	1,857.65	\$ 3,700.28

SERVICES	STAFF HOURS	STAFF NAME
<u>Fall 2009 Services</u>		
Phase-IA Construction Manual Requirements (2 Contacts)	3.0	Tim Stepp
Facility FA mechanism requirements (2 Contacts)	2.0	Tim Stepp
<u>2010 Services</u>		
Phase-IA Construction Manual Review (3 Contacts)	14.0	Tim Stepp
Facility FA mechanism requirements (2 Contacts)	2.0	Tim Stepp
License renewal & fees activities (5 contacts)	7.5	Mary Hendrickson
Site Inspection (1 contact)	2.0	Joe Blaine
<u>2011 Services</u>		
Facility FA mechanism requirements (8 Contacts)	9.0	Tim Stepp
Storm-water discharge violation (6 Contacts)	3.0	Tim Stepp
License renewal & fees activities (8 Contacts)	11.5	Mary Hendrickson
Site Inspection (1 contact)	2.0	Kathy O'Hern
<u>MDEQ Letter Reviews</u>		
	3.0	Rick Thompson
	2.0	Mary Hendrickson
<u>Overhead</u>		
Support staff, copying, filing, etc.	20%	